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In The Supreme Court Of The United States

OCTOBER TERM 1996

SHAWN PAUL NOVAK,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

Maureen L. White
Attorney at Law
9201 Forest Hill Avenue
Suite 110
Richmond, Virginia 23235
(804) 320-4000

Ross S. Haine
Counsel of Record
Attorney at Law
Post Office Box 1258
205 S. Main Street
Lexington, Virginia 24450
(540) 464-6306

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTION PRESENTED FOR REVIEW

WHETHER THE LOWER COURTS ERRED IN ADMITTING SHAWN NOVAK'S STATEMENT WHICH WAS OBTAINED IN VIOLATION OF THE CONSTITUTIONAL RIGHTS GUARANTEED TO HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

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OPINIONS BELOW

Prosecution of Shawn Novak was commenced in the Virginia Beach Juvenile and Domestic Relations Court, a court not of record. Jurisdiction was transferred to the Virginia Beach Circuit Court where both the hearing on the motion to suppress and trial of the defendant were had. On January 6, 1991 Shawn Novak filed a motion to all the "alleged evidence in this cause on the grounds that any and all evidence was seized or obtained without probable cause or based upon an unlawful or unreasonable search, seizure or interrogation in contravention of the rights and privileges accorded the defendant under the United States and Virginia Constitutions."

On February 3, 1992 a hearing on the motion to suppress was had. The trial court heard testimony from the defendant's mother, Jenny Novak and from Detective Hoffman. Admitted into evidence were the video tape of Shawn Novak's confession, the transcript of said video tape and summaries of witness interviews which were conducted prior to the interrogation of Shawn Novak. The hearing extended to February 4, 1992. On that same date, the trial court denied said motion. The findings of fact and the ruling of the trial court are contained on pages 35-43 of the Appendix, hereinafter referred to as A__.

The capital trial of Shawn Novak was commenced on March 2, 1992 and on March 9, 1992 the jury returned a verdict convicting Shawn Novak of capital murder as charged. On May 4, 1992, upon consideration of a presentence report and argument presented by counsel, the trial court sentenced Novak to life in prison for the capital murder of Danny Scott Geiger and Scotty Weaver. The case was held open pending any post trial motions. When no motions were forthcoming, final judgment was entered on

June 15, 1992.

Novak timely filed a petition for appeal to the Virginia Court of Appeals. Said petition was granted; among other issues, the Virginia Court of Appeals agreed to consider whether the admission of Shawn Novak's confession violated the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. By opinion dated May 23, 1995 a three judge panel of the Virginia Court of Appeals affirmed the trial court's ruling that the admission of the confession did not violate the rights guaranteed to Shawn Novak under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Judge Benton, one of the three judge panel, dissented from the majority opinion. Said opinion is attached in its entirety. (A- A34).

Novak timely filed a petition for appeal to the Virginia Supreme Court. By order dated January 10, 1996 the petition was denied.(A1). Novak then filed a petition for rehearing which was also denied by order dated March 1, 1996. On May 17, 1996, Novak filed a motion for an extension of time within which to file a petition for a writ of *certiorari*. On May 22, 1996 Chief Justice Rehnquist extended the time to and including July 1, 1996.

JURISDICTION

The judgment of the Virginia Supreme Court denying petitioner's appeal was entered on January 10, 1996. A petition for rehearing was denied on March 1, 1996. This Court extended the time to file a petition for a writ of *certiorari* to and including July 1, 1996. This Court's jurisdiction is invoked pursuant to U.S.C. Section 1257, petitioner having asserted below and asserting herein a deprivation of rights secured by the United Sates

Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States which provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life; liberty or property without due process of law

2. This case also involves the Sixth Amendment to the Constitution of the United States which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

3. This case also involves the Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> No state shall make or enforce and law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life liberty, or property without due process of law.

STATEMENT OF THE CASE[1]

On Monday, March 4, 1991, two boys, Daniel Geiger, age nine, and Christopher Weaver, age seven, were reported missing in the City of Virginia Beach, Virginia. Their bodies were found on March 5, 1991. The boys were killed by multiple stab wounds. On March 9, 1991, Shawn Paul Novak (hereinafter referred to as Shawn) confessed to the two homicides. Shawn, a juvenile, had just turned 16. It is that confession, the events leading up to, and the circumstances surrounding that confessions which are at issue in this case.

On March 6, 1991, homicide detective Hoover called Shawn's mother, Jenny Novak, at her place of employment and requested permission to speak with her children. She said, "No," and repeated that response several times as the detective argued with her on the phone, insisting that such questioning was routine. Hoover never told her that he was calling from her house and in fact, had already begun questioning her children. Mrs. Novak discovered this fact by calling her home and talking to her son, Shawn's brother. He told her that the police were at that moment questioning Shawn in their police car. When Mrs. Novak arrived home a short time later, the police were gone and her son Shawn was at home. (A133 -35).

Hoover returned later that evening and requested Mrs. Novak's permission to take Shawn to the police station. "[The detective] wanted to take [Shawn] out in his car and

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[1] The Statement of the Case is based almost entirely on the evidence adduce at the hearing on the motion to suppress, had on February 3-4, 1992.

buy him a hamburger and talk to him alone. I refused to let him do that. He kept insisting that he had to talk to him alone." The detective told Mrs. Novak he needed to talk to Shawn alone because he might not admit to having engaged in certain delinquent activities if she were present.(A135-36). The detective took Mrs. Novak outside and again began arguing with her, insisting that Shawn must come to the station. (A A135-36). Although Mrs. Novak refused to allow the detective to transport Shawn to the station, she finally agreed to take Shawn herself. (A136). Mrs. Novak requested that she be present during all questioning of Shawn. The police ignored Mrs. Novak's requests and excluded her from the two hour interrogation that evening. (A136). When the police returned Shawn to his mother, they told her that Shawn had become upset because "he had misunderstood something the detective had said." (A137). The police said that they were ceasing the interview at that time due to the late hour and the fact that Shawn "needed to go home and get his rest." They requested permission to speak with Shawn again and Mrs. Novak again told them that she was to be present during all questioning of her son. (A138).

The following day, Thursday, March 7, the police again ignored Mrs. Novak's express request that all questioning take place in her presence. They waited for Shawn to arrive home from school, and again called Mrs. Novak from inside her home after the questioning had already been initiated. She demanded that they leave her home which they did. (A138-39).The police called Mrs. Novak shortly after she arrived home. Detective Tucker first apologized profusely for Detective Hoover's conduct, assuring her that his roughshod manner was "all a mistake." (A139). He then asked her to bring Shawn to the station, which Mrs. Novak refused to do. After two or three more telephone calls from the police Mrs.

Novak relented, agreeing to a station house interview, on the condition that she be present during the questioning. (A139-40). Again that request was ignored and she was again excluded from a two hour interrogation of her son. Mrs. Novak testified that following that interview, Shawn "felt good" about having been able "to help." (A140).

On Friday, Detective Tucker called Mrs. Novak and convinced her to bring Shawn down to the station that evening. Mrs. Novak testified that Hoover was "very nice" during this conversation. (A141). Mrs Novak was delayed in getting Shawn to the station and she testified that the police "kept calling" her. Finally she told them she was unable to take Shawn to the station and told them she would come the following morning. They said that was fine.(A141). Shawn was interrogated at the station the following morning, Saturday, March 9, 1991, and it was during the course of this interview that he confessed to the crime.[2]

Mrs. Novak stated that she only allowed this final interview to take place because of the representations of the police. The police repeatedly told her that Shawn was not a suspect. She stated,"They kept assuring me that I was being overly worried, that I was maybe even paranoid, **that there was no reason for me to be concerned about Shawn because <u>he was not a suspect"</u>**. (A142-43) (emphasis added).

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The entirety of this interview was videotaped with audio. Neither the attached transcript of that interview, nor the attempt at description by this author, begins to capture the compelling circumstances surround this interrogation. A copy of the tape has been submitted to this Court. Petitioner respectfully requests and urges this Court to view said tape.

At no time during this interview, prior to his admission of guilt, was Shawn, or his mother, advised of Shawn's is constitutional rights. The Commonwealth presented no evidence that his rights were read to him any time prior to Saturday. Shawn had no prior experience with the criminal justice system. He had never before been charged with a crime or been interrogated. (Pages 302-3 of the joint appendix presented to the Virginia Courts). He had never previously had the need to exercise his Fifth and Sixth Amendment rights. Notwithstanding his lack of experience with the criminal justice system, Shawn was very bright. He was in tenth grade honors programs and had scored very high on standardized tests administered to Virginia students. (A155).

At the suppression hearings, the police denied that Shawn was a suspect when he arrived at the police station Saturday morning. This assertion strains incredulity. The police had compiled a vast amount of information on Shawn prior to the Saturday interrogation and of which Hoffman was aware when he interrogated Shawn. (A189-194). They interviewed a number of people specifically for the purpose of obtaining information about Shawn. The gathered information strongly implicated Shawn's involvement in the crime. The interview summaries are contained in the Appendix. The police interviewed John Cleapor. (A111-18); James Young and his mother, Mrs. Beery (3 interviews, A119-23,131); Jennifer Whitworth (A124); Edna Lawrence, one of Shawn's teachers (A126-28); and Jammie Allen. (A129). The interviews focused almost entirely on Shawn, though initially there seemed to be some interest in John Cleapor. Other than Shawn, John Cleapor was the only one of these individuals interviewed at the police station. Mrs. Beery was interviewed three times, each time almost exclusively about Shawn. The

interviews revealed that Shawn had told a number of people that he was the last person to have seen the boys alive and that he was the one who discovered their bodies, a fact which the police knew to be untrue. The information from the interviews revealed that Shawn often exhibited very bizarre behavior which suggested mental disturbance. On one occasion, Shawn was found standing in a trash can, alone in a darkened classroom. They were also aware that Shawn had been frequently seen talking to inanimate objects and had worn a necklace with a dead birds head on the end. Indeed, intensive psychological testing revealed Shawn to be a very disturbed child and the judge so found on the day of his sentencing.

Armed with this vast compilation of incriminating information, the police interrogated Shawn on the morning of Saturday, March 9. Mrs. Novak escorted her son to the interrogation room and initially refused to leave that room despite Detective Hoffman's entreaties that she do so. (A45-47). Hoffman initially told Mrs. Novak that Shawn was "not under arrest." (A45). However, Hoffman never told Mrs. Novak that Shawn was free to leave or free to terminate the questioning at any time. Hoffman tried to convince Mrs. Novak to leave the interrogation room, initially to no avail. Hoffman told Mrs. Novak that the interviews with Shawn were strictly routine and were being conducted to prompt Shawn's memory about details regarding other people's activities. He told Mrs. Novak that it was necessary to talk to Shawn alone so he would not feel uncomfortable in relating delinquent activities engaged in by himself and his friends.(A45-46). Hoffman said he had interviewed other kid's five or six times in relation to this case, although the record belies that assertion. (A45). Mrs. Novak responded that the failure of the police to honor her wishes up to that point concerned

her. She also stated that their persistence made her suspicious. somewhat suspicious. For those reasons she wanted to stay. (A46). Hoffman stated that he was not trying to hide anything from her. He tried very hard to convince her that her refusal to allow him to speak with Shawn alone would hinder his investigation of the murders, telling her that he had already lost an entire day because another parent had refused to allow him to talk to his child alone. (A47). He then stated, "There are certain things that I would like to get clarified, and you know, [your presence is] going to inhibit me and I hope I don't lose anymore time with this. I've got to get rolling on this thing." Finally he told Mrs. Novak that he would not and did not employ improper interrogation techniques. He suggested that she had seen too many movies. Mrs. Novak insisted on staying and the interview commenced with her in the room. (A47).

The interrogation was conducted in a very small room, with Mrs. Novak seated against a wall facing the detective who appeared to be leaning on a table, and whose back was to the camera. The precise dimensions of the room are not clear as Hoffman's testimony on this point varied greatly; it was either 10' by 12', or 8' by 10' or 7' by 8'. (App. 834-5, 862, 494). Shawn was against a far wall to his mother's left and the detective's right. The door was to Mrs. Novak's right.

The initial portion of the interrogation consisted of very routine and matter of fact questions asked and answered in normal conversational tones. Hoffman would ask three or four questions and then pause to make notes He rarely interrupted Shawn (A47-60). Shortly into the interview Hoffman turned and addressed Mrs. Novak in a tone of annoyance, asking rhetorically whether she understood why

these interviews took so long. (A50). Shawn's demeanor was very relaxed and casual. Thirty after the commencement of the interview, Hoffman asked Mrs. Novak if she felt comfortable, to which she responded, "Yes, now." Hoffman then reiterated his need to speak with Shawn alone and invited her to discuss it with Shawn. (A60-63). Hoffman left the room and upon his return again implored her to leave. He again suggested that her failure to do so would hinder his investigation. (A61-62). He expressly stated that Shawn would not be asked any questions about the two boys.(A60, A161). He further stated that no improper interrogation techniques would be employed. (A61). Hoffman tried to persuade Mrs. Novak to leave the station, but that she refused to do, although she was finally persuaded to leave the room The transcript does not begin to capture Mrs. Novak's very obvious reluctance to leave the room. The video tape demonstrates very clearly that she did not want to leave her son in that room alone with Hoffman. But Hoffman finally prevailed; Mrs. Novak, with obvious misgivings, left the interrogation room.

Upon Mrs. Novak's departure, Hoffman seated himself directly in front of Shawn at a distance of no more than six to twelve inches from them. He placed himself between Shawn and the only door out of the room. He literally had Shawn up against the wall. The tenor of the interrogation began to change. Previously, Hoffman had frequently paused between questions and had rarely interrupted Shawn. Now, the pace increased. The questions became more pointed and quickly followed Shawn's answers. Hoffman frequently interrupted Shawn. The questions became more confrontational in tone and substance. Significantly the first questions after Mrs. Novak's departure were about the murdered boys.(A63). Hoffman took a break thirty or so minutes after Mrs. Novak had departed. Twice he told Shawn to go let his mother know

he was okay. He said, "Let's just say 'hi' to mom so we won't be upset and nervous and everything."(A83).

Following that break, the intensity of the interrogation changed drastically. Hoffman confronted Shawn with inconsistencies between his statements and the statements of others. He interrupted Shawn frequently. He began gesticulating his hands directly in front of Shawn's face, bearing down on the child physically. Although Shawn had, up to this point, appeared relaxed, now he was not. Shawn now became apprehensive. He pressed his body against the dy against the back of his chair in an effort to to distance himself from the increasingly aggressive detective. The remainder of the interrogation consisted of Hoffman confronting Shawn with inconsistencies and telling Shawn lies regarding evidence possessed by the police. It is significant that Hoffman did not tell Shawn any lies until mom's departure. After her departure he told at least three. He told Shawn that the police had observed him at the search.(A90). That was a lie. (A162, A170) He told Shawn there was a witness who had seen him with the boys on Monday. That was a lie. (A162, A171). He ttold Shawn one of his fingerprints was on one of the bodies. That was a lie. (A162, A170-71). Interspersed through all of that were repeated assurances that Hoffman was not trying to trick Shawn and that Shawn was not a suspect.

This aggressive questioning culminated with Shawn's admission that he had found the bodies before the searchers did and he picked them up and hid them. At that point, Hoffman's voice became very soft and soothing. Shawn admitted cutting branches and placing them over the boys. Hoffman continued to speak in a soft soothing tone; Shawn was crying. Hoffman asked, "You killed them, didn't you?" Shawn, nodded affirmatively. . A knock interrupted the interrogation. Hoffman exited the room and Shawn was left in

the room alone, sobbing. Hoffman returned. In a barely audible voice, he read Shawn his Miranda rights as Shawn was leaning over, head in his hands, still crying. Asked if he understood these rights, Shawn nodded. This was the first and only time Shawn was read his rights. Hoffman asked whether Shawn wanted someone to tell his mother and Shawn said, "Let her know." (A107). The interrogation continued for at least sixteen more minutes. In that time Shawn revealed the details of the alleged crime.

The police either did not immediately inform Mrs. Novak of her son's confession or they continued to question Shawn after she demanded they stop. Mrs. Novak testified that as soon as she was informed of the confession, she demanded that all questioning cease. Mrs. Novak was told by the police that Shawn was in the room alone at that time, and that "Hoffman was so shocked at hearing this from Shawn that he almost passed out. He was so pale when he stepped out of the interrogation room."(A154).

Although Shawn was not read his rights prior to admitting that he had killed the boys, he was, by Hoffman's own admission, a suspect well before that point. At the juvenile hearing Hoffman testified that Shawn became a suspect at the point in time immediately preceding his lie to Shawn regarding Shawn's fingerprints. (See, A180). That point in time was at least thirty minutes prior to the time at which Shawn was advised of his rights. Hoffman did concede that he was of suspicious of Shawn before the final interview.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A. Introduction

Shawn Novak had turned 16 only a few weeks prior to confessing to the crimes of which he was ultimately convicted. Accordingly, we first look to the first issue to be addressed is the particular vulnerability of children in dealing with the police. The next issue explored is the voluntariness of the confession. An analysis of the law as applied to the particular facts in this case makes it abundantly clear that Shawn Novak was in custody at the time of his interrogation, was never advised of his constitutional rights and gave a confession against his will. Further, the analysis will reveal that the police engaged in a deliberate course of conduct calculated to deprive Shawn of his mother's counsel in violation of the Sixth Amendment. Finally, the split among the states' highest courts will be examined. As far as Petitioner can ascertain, Virginia stands alone in finding that a confession given by a juvenile when his mother was excluded against her will, was noncustodial and voluntary.

B. THE INTERROGATION OF CHILDREN

This Honorable Court has long recognized the particular vulnerability of children confronted by police interrogation tactics. In Haley v. Ohio, 332 U.S. 596 (1948), this Honorable Court stated:

> And when as here, a mere child - an easy victim of the law-- is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe

> and overwhelm a lad in his early teens. This is the period of great instability which the crises of adolescence produces. ... He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.

Id. at 599.

Recent empirical studies have confirmed why special care must be taken in the interrogation of juveniles. They are particularly vulnerable to overbearing police tactics. A 1969 study in San Diego concluded that only a small percentage of juveniles are capable of knowingly and intelligently waiving *Miranda* rights." Ferguson & Douglas, "A Study of Juvenile Waiver," 7 *San Diego Law Review* 39, 54 (1970). The authors summarized the study by concluding that "within this project, 86 of 90 juveniles freely and voluntarily waived their constitutional rights. Of the 86, only 5 achieved an understanding score of 10. In other words, 81 of the 86 by achieving scores of less than 10, did not consciously and fully understand their rights." Id. at 53. A more recent and comprehensive study sought "to provide empirical information with which police, lawyers, judges, and legislative lawmakers could address the question of juveniles' competence to waive *Miranda* rights." Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* 8 (Plenum Press: 1981). Following an extensive study on the ability young people to comprehend their interrogation rights, the author concluded that the majority of juveniles 14 years or younger were not competent to waive their rights to silence and counsel. The results similarly raised questions regarding the competence of juveniles aged 15 to 16, to waive those rights, especially in those cases where the juvenile had little or no prior contact with the police. *Id.* at 203-204.

Dr. Gary Melton, the leading authority on the interface between child psychology and the legal system, found Grisso's methodology to be most credible and his conclusions inevitably dictated by the results of the study. Melton, "Making Room for Psychology in *Miranda* Doctrine: Juveniles' Waiver of Rights," 7 *Law and Human Behavior* 67 (1983). A recent study examined the ability of 115 learning disabled and non-learning disabled youths from five high schools in four school districts in eastern Virginia. Zaremba, *Comprehension of Miranda Rights by 14-18 Year Old African-American and Caucasian Males With and Without Learning Disabilities* (Unpublished Doctoral Dissertation, School of Education, The College of William and Mary, 1992). Building on Dr. Grisso's research, Dr. Zaremba concurred with Grisso's findings on race and intelligence, as measured by IQ testing, and further found the presence of a learning disability constituted another negative factor in the comprehension of Miranda rights. Notable is Zaremba's finding that age of the student is not as significant in improving the understanding of one's constitutional rights as Grisso had posited. She found that non-learning disabled high school students performed below the acceptable level of comprehension determined by Grisso for a valid waiver of rights. The teenagers had special problems in understanding the role and time for intervention by a lawyer if asserting their right to an attorney. Many equated an attorney with a social worker, and some believed that their invocation of the right to counsel would entitle them to a lawyer "when I go to court." Id. at 87. Dr. Zaremba concluded that **"no juvenile, ...** should be allowed to waive [their rights] without an attorney present." *Id.* at 96 (emphasis in original).

Thus, the results of several empirical studies on the capacity of juveniles to understand and intelligently assert their self-incrimination rights as articulated in *Miranda*, lead

inevitably to the conclusion that juveniles must be extended far greater protections than those customarily accorded to adults in interrogation settings. Juveniles are deemed to lack the legal capacity to make wills, enter into contracts enforceable against them, marry without parental permission, or engage in any number of important activities. And yet a juvenile is presumed capable of waiving important constitutional rights during a police interrogation which exposed a sixteen-year-old youth to the awful possibility of execution in Virginia's electric chair.

I. THE MIRANDA ISSUE

The Virginia Court of Appeals erred in finding that Novak was not in custody prior to that point in time at which he made an initial admission of guilt. Novak v. Commonwealth, 20 Va. App. 373, 386, 457 S.E.2d 402 (1995)(hereinafter referred to as Novak, with references to the appropriate page in the appendix). In Miranda v. Arizona, 384 U.S. 486 (1966), this Honorable Court held that statements made by an accused during custodial interrogation, without being advised of his constitutional rights, are not admissible into evidence. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any way." Miranda, 384 U.S. at 444. All the circumstances surrounding the interrogation must be examined to determine whether the suspect's freedom of action is curtailed to a "degree associated with formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983)(*per curiam)*. The appropriate inquiry is "how a reasonable man in the suspect's position would have understood his position," Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

An examination of all the circumstances surrounding this confession quickly reveals that no reasonable sixteen year old in Shawn Novak's position would have believed that he was free to leave. In United States v. Griffin, 922 F.2d 1343 (8th Cir. 1990), the Eighth Circuit Court of Appeals engaged in a very thorough analysis of the factors relevant to a determination of custody and the weight which should be accorded each. The Griffin court found that the typical inquiry will examine the "accused's freedom to leave the scene and the purpose, place and length of the interrogation." Griffin, 922 F.2d at 1348 (citations omitted). More critical to the determination of whether an interrogation is custodial are the following:

> (1.) Whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2.) Whether the suspect possessed unrestrained freedom of movement during questioning; (3.) Whether the suspect initiated contact with the authorities or voluntarily acquiesced to official requests to respond to questions; (4.) Whether strong arm tactics or **deceptive stratagems** were employed during questioning; (5.) Whether the atmosphere of the questioning was police dominated; or, (6.) Whether the suspect was placed under arrest at the termination of questioning.

Id.(emphasis added).

The Griffen pointed out that this list is not an exhaustive one, but is representative of the most frequently encountered indicia of arrest. The Griffen court characterized the first three factors as being "mitigating factors," and their presence would tend to vitiate a finding of custody. The final

factors were characterized as "coercive factors," and their presence would tend to support a finding of custody. As the Griffen court noted, the presence of all is not necessary to a determination of custody; a "particularly strong showing of one factor may compensate for a deficiency with respect to the other factors." Id. citing South Dakota v. Long, 465 F.2d 65, 70 (Th Cir. 1972), *Cert. denied.* 409 U.S. 1130 (1973).

The application of these factors to the instant case is instructive in reaching the conclusions that the final interrogation of Shawn Novak became custodial long before any Miranda warnings were read to him. No reasonable juvenile in Shawn's position would have understood that he was free to leave. "By virtue of his youthful age and lack of experience with the police, Shawn had no basis upon which to conclude that he had not been deprived of his freedom of action." Novak, (dissenting opinion, A28).

"Compulsion is inherent in custodial settings," Miranda, 384 U.S. at 458. At the insistence of the police, Shawn was interrogated at the police station, in an interrogation room for a total of more than six and one half hours. Prior to the station interrogations, Shawn was interrogated in a police car.

Although Hoffman denied that Shawn was a suspect prior to the final interview, he did concede that he was "suspicious" of Shawn prior to that time. As Judge Benton noted in his dissent Hoffman's assertion that Shawn was not a suspect is strongly belied by the record. Novak, A28. He had interviewed numerous people regarding Shawn's conduct, movements and statements. Shawn had given contradictory statements to these individuals.

The first three mitigating factors cited by the Griffen court were remarkably absent in the circumstances

surrounding Shawn's interrogation. The first factor is whether the suspect was told he was not under arrest or free to terminate questioning. Here, although Shawn and his mother were told that Shawn was not "under arrest,"no reasonable person in their circumstances would have understood this to mean that Shawn was free to terminate questioning at any time, and leave the station. Mrs. Novak testified that she had repeatedly attempted to resist requests to interrogate Shawn at the station, all to no avail. Each visit to the station was prompted by the insistence of the police.

The second factor is whether the suspect possessed unrestrained freedom of movement during questioning. Although the Commonwealth, both at trial and in its brief, emphasized the fact that Shawn was free to the leave the interrogation room and obtain refreshments, he only did so when Hoffman called a break. Furthermore, Hoffman dominated Shawn during at least one break; he told Shawn twice to "say hi to mom" so she would not worry. Hoffman thereby prevented any request by mom to re-enter the interrogation room.

The final mitigating factor is whether the suspect initiated contact with the police or "voluntarily acquiesced to official requests to respond to questions." Mrs. Novak testified that the police were very persistent and it was at their insistence that Shawn was interrogated at the station three times. She resisted the questioning of Shawn on several occasions. But they ignored her stated wishes. There is no evidence on this record from which to conclude that Shawn "voluntarily acquiesced to respond to questions."

In contrast to the absence of mitigating factors is the presence of the coercive factors cited by the Griffen court.

The first of these is whether strong arm tactics or deceptive stratagems were employed during questioning. The record clearly shows that Hoffman employed "deceptive stratagems." He did so to persuade mom to leave the room. He told mom Shawn was not a suspect and that he would ask no questions. Immediately after she left however, he began to ask Shawn about the murdered boys. He lied to Shawn Hoffman assured Shawn that Shawn was not a suspect and repeatedly told Shawn that he "[was] not trying to trick him." As Judge Benton noted, Hoffman "lied to Novak at least four times during the course of the interview." This included telling Shawn that his fingerprints had been discovered on the body through the use of new laser finger printing technology. He also told Shawn that witnesses had seen him with the boys on Monday.

The next factor is whether the atmosphere of questioning was police dominated. The final interrogation took place at the police station in a small closed room, without windows. It followed two other interrogations at the same place, each lasting two hours and each occurring while Shawn was separated from his mother.

As soon as Mrs. Novak left the interrogation room, both the tenor and the substance of the questioning changed. Prior to Mrs. Novak's departure, Hoffman had been seated adjacent to Shawn and had to turn his head to look at Shawn. Physically Hoffman dominated Shawn by using his size and his close physical proximity. As soon as Mrs. Novak left, Hoffman moved closer to Shawn, positioning himself directly in front of Shawn, and between Shawn and the door. Hoffman, a fairly burly man, firearm at his side, loomed over Shawn, often gesticulating his hands closely to Shawn's face.

Psychologically he dominated Shawn by using false assurances and lies. Immediately after mom's departure Hoffman began asking Shawn about the murdered boys although he had assured Mrs. Novak, in Shawn's presence, that he would not. Hoffman repeatedly assured Shawn that he was not trying to trick him. He told Shawn that Shawn was not a suspect. Aggressive and strident tones were followed by calm and soothing ones which were finally employed to lull Shawn into a confession.

Finally, the strongest showing is Hoffman's complete dominance during the questioning. First, as earlier stated, he overbore Mrs. Novak's will and by extension, Shawn's. He persuaded Mrs. Novak to leave the room notwithstanding her great reluctance to do so... The application of the Griffen analysis clearly demonstrates that the questioning of Shawn Novak was custodial long before he was advised of his constitutional rights.

Hoffman also dominated the interrogation by excluding Mrs. Novak. This Court condemned this police strategy police strategy in Miranda, 384 U.S. at 449-450, 455, noting its very coercive effect. Certainly in this case, the deliberate exclusion of Mrs. Novak was by far and away the most egregious of all the events leading up to and surrounding the final interrogation of Shawn. In Griffen, the court commented on the agents' exclusion of the suspect' parents from the dining room in which they held him. The court stated:

> By sending Griffin's parents away, the agents asserted their dominion over the interrogation site, isolating Griffen from family who may have provided moral support, and eliminated any last vestige of a public interrogation. Any objective reasonable person would

> conclude from these actions that the authorities were now in complete control of the defendant. Indeed, the agents did create an atmosphere which cause Griffen to be fearful.

Griffen, 922 F.2d at 1355.

Hoffman did precisely the same thing in this case. He excluded Mrs. Novak, against her will. Hoffman requested Mrs. Novak to leave that room and she did so with the most extreme reluctance. No reasonable juvenile witnessing an encounter similar to that between Hoffman and Mrs. Novak would conclude that he was free to terminate questioning or leave the interrogation. Having coerced the confession, Hoffman read the sobbing boy his rights. He then continued the interrogation for approximately another sixteen minutes. Shawn had asked that his mother be told, a request that was presumably ignored. Hoffman then arrested Shawn.

As the Griffen court noted, the deliberate separation of a suspect from his friends or family almost inevitably leads to the conclusion that the suspect was, in fact, in custody. "It is an established interrogation practice. ..." Griffen, 922 F.2d at 1352, citing Miranda, 384 U.S. at 451. As stated, the Griffen court found it very significant that the police isolated the suspect by taking him into his dining room "for privacy," and "sending his parents away." It held that under these circumstances, the suspect wast in custody and therefore should have been read his Miranda rights. The statement was suppressed. Griffen, 922 F.2d at 1356-57.

Other federal courts addressing the issue have found isolation from friends and family to be significant in viewing the totality of circumstances. The fact of such isolation almost inevitably leads to a finding that the questioning was custodial

and the suspect should have been advised of his constitutional rights. See generally, cases cited in Griffen, 922 F.2d at 1350-1353. See also, United States v. Griffen, 7 F.3d 1512 (10th Cir.1993)(suspect in custody when separated from friend prior to questioning by police in small airport office); United States v. Carter, 884 F.2d 368 (8th Cir. 1989)(Custodial interrogation where bank employee questioned in the president's office away from the supportive environment of co workers); United States v. Beraun-Penz, 812 F.2d 578 (9th Circ. 1987)(warnings required prior to questioning where police dominated interrogation scene by sending suspect's co worker away); United States v. DiGiacomo, 579 F.2d 1211 (10th Cir. 1978)(warning required where suspect separated from her four companions).

All of the foregoing authority mandates the conclusion that Shawn Novak's interrogation was custodial, if not in its entirety, then at the moment his mother left the room. Because he was not advised of his constitutional rights at that time, all statements given during that final interrogation and the evidence derived therefrom should have been suppressed. As this Court stated in Escobedo v. Illinois, 378 U.S. 478, 490 (1964):

> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. ... If the exercise of constitutional rights will thwart the effectiveness or law enforcement, then there is something very wrong with that system.

II. THE INVOLUNTARINESS ISSUE

Just as the circumstances leading up to and surrounding Novak's confession mandate the conclusion that he was in custody, so do they mandate the conclusion that his confession was not voluntary. The totality of circumstances must be examined to determine whether "the confession [was] the product of an essentially free and unconstrained choice by its maker. ... [And if the maker's] will has been overborne and his capacity for self determination critically impaired, the use of his confession offends due process." Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973), citing Columbe v. Connecticut, 367 U.S. 568, 602 (1961).

"Special care must be used in "scrutinizing the record [of a juvenile's confession.]" Haley v. Ohio, 332 U.S. 596, 599 (1947). Application of the test of the totality of the circumstances "mandates inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." Fare v. Michael C., 442 U.S. 707, 725 (1979).

Again, it is abundantly clear on this record that Shawn Novak's will was overborne. Shawn, a juvenile who had just turned 16, had no prior experience with the police. He had never previously been interrogated and thus, had never before been confronted with issue of understanding or exercising his rights. The record establishes that Shawn was an extremely obedient boy, always deferential to authority. Further, the police had information which strongly indicated Shawn's mental disturbance. They knew, for example, that on one

occasion, Shawn was found standing in a trash can, alone in a darkened classroom. They were also aware that Shawn had been frequently seen talking to inanimate objects and had worn a necklace with a dead birds head on the end. Indeed, intensive psychological testing revealed Shawn to be a very disturbed child and the judge so found on the day of his sentencing.

These factors were compounded by the very coercive circumstances surrounding his interrogation which were more fully examined in the preceding section. However, it cannot be emphasized strongly enough that the deliberate exclusion of Shawn's mother from the interrogation room was by far the most coercive factor. She repeatedly requested to be present during the questioning and those requests repeatedly went unheeded. The detective told her, in Shawn's presence, that there would be no questions relating to the dead boys. But, as soon as she left he began questioning Shawn about the dead boys. Having finally, after 2 hours of questioning, which was preceded by two other two hour sessions, obtained an admission from Shawn regarding his involvement, Hoffman, for the first time read Shawn his constitutional rights. At that point in time Shawn was sobbing and held his head in his hands. There can be no doubt that his distress precluded a full understanding of those rights.

A purview of this Honorable Court's precedent underscores the egregiousness of this circumstance. This Court has stated that the confessions of juveniles requires "special caution." In re Gault, 387 U.S. 1, 45, (1967). See also, Gallegos v. Colorado 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1947). In each of those cases the confession of the juvenile was held involuntary. Further, in each of those cases this Court stressed the fact that the juveniles in question had no parent or adult friend to guide them during the course of the interrogation. In Gallegos, the

Court stated:

> But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Gallegos, 370 U.S. at 53.

III. THE CURRENT LEGAL LANDSCAPE REGARDING JUVENILE CONFESSIONS

Aware of the vulnerability of juveniles interrogated by the police, many states have, either judicially or legislatively, adopted rules which afford special safeguards for the waiver of a juvenile's constitutional rights. Some require that the parents also be advised of and understand the rights which the juvenile is waiving. See, State v. Jiminez, 799 P.2d 785 (Ariz. 1990). Others require that the juvenile be afforded the "opportunity to confer with an interested adult" prior to waiving constitutional rights. Commonwealth v. Berry, 570 N.E.2d 1004, 1007 (Mass. 1991). Almost all the states, including Virginia, agree that the absence of a parent from custodial interrogation "weigh[s] against the admissibility of that statement." Miller v. Maryland, 577 F.2d 1158, 1159 (4th Cir. 1978). However, to the best of Petitioner's knowledge, Virginia stands apart from her sister states; Virginia is the only state holding a juvenile confession both noncustodial and voluntary when it is borne of an interrogation from which the parent was deliberately excluded, against the parent's will, and without the knowing and

intelligent waiver of her presence by the child.

See *e.g.* People v. Montanez, 652 N.E.2d 1271 (Ill.App. 1 Dist. 1995), *Cert.. denied,* ____ *U.S.* ___ (1996). the Illinois Court strongly condemned the deliberate exclusion of the suspect's mother from the custodial interrogation. The suspect's mother, Mrs. Lorenzi, testified that the police came to her home and informed she and her husband that their daughter was in protective custody because she had been a witness to a murder. Mrs. Lorenzi asked to see her daughter and was told she could not because her daughter was in protective custody and they told her they would advise her when she could see her daughter. Four hours later, not having heard from the police, Mrs. Lorenzi went to the station. She arrived at approximately 2:00 a.m. She was told to wait and did so for an hour and a half. She then went upstairs where the detective told her to "get the hell out" because they were talking to her daughter. Finally, at about 8:00 a.m. Mrs. Lorenzi was allowed to see her daughter who appeared to be under the influence of intoxicants.

The State's evidence showed that the defendant's statement was taken at 5:15 a.m. the defendant was advised of her rights and she stated that she had been treated well and had no complaints. The deliberate exclusion of the suspect's parent weighed very heavily in the Montanez court's analysis of the totality of the circumstances. The court also cited number of other Illinois cases where similar facts where a parent was deliberately excluded mandated a finding that the statement was not voluntary. The court did, however, stop short of holding that such a circumstance is a *per se* violation of the juvenile's constitutional rights.

In People v. Jordan, 386 N.W.2d 594, 599 (Mich. App. 1986), the court found that the confession of the juvenile was involuntary when the police refused to allow the suspect's mother and sisters to accompany the juvenile to the station.

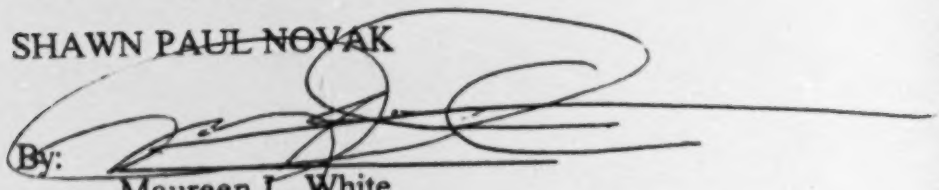
There was also some evidence presented that the police threatened the juvenile. The New York courts have similarly condemned such sharp practices by the police. In People v. Townsend, 300 N.E.2d 722 (N.Y 1972) the mother of a 17-year-old boy repeatedly called the police about her son. They denied that the boy was in custody. Not only was the boy in custody at the time, but confessing to a crime. See also, People v. Bevilacqua, 382 N.E..2d 1326 (N.Y. 1978) (statement suppressed when given after 18-year-old suspect asked to see mother and suspect's lawyer requested the cessation of all interrogation and concealed suspect's whereabouts from his lawyer).

CONCLUSION

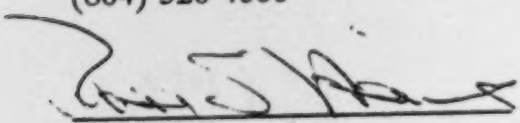
For all the foregoing reasons the writ should be granted

Respectfully Submitted,

SHAWN PAUL NOVAK

By: 

Maureen L. White
Attorney at Law
9201 Forest Hill Avenue
Suite 110
Richmond, Virginia 23235
(804) 320-4000



Ross S. Haine*
Attorney at Law
Post Office Box 1258
205 S. Main Street
Lexington, Virginia 24450
(540) 464-6306

Attorneys for Petitioner

*Counsel of Record